THE HIGH COURT OF SWAZILAND

W AND W GARMENTS (PTY) LTD

Applicant

And

BATHOBILE GULE

1st Respondent

THE CONCILIATION FOR MEDIATION ARBITRATION COMMISSION

2nd Respondent

SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION

3 rd Respondent

Civil Case No. 2396/005

Coram: S.B. MAPHALALA - J

For the Applicant :MR. S. SIBANDZE

For the Respondents:MR. S. MADZINANE

The relief sought

JUDGMENT

(11 November 2005)

[1] This is an application for review emanating from an arbitrator's award handed down by the 1st Respondent in a matter between the Applicant and the 3rd Respondent under the auspices of the 2nd Respondent. The ground advanced in support therein is that in the circumstances the 1st Respondent's ruling be reviewed on the basis that it is grossly unreasonable.

The parties.

[2] The Applicant is a company in the garment industry in Matsapha and its Founding affidavit is deposed to by its Human Resources Manager, one Brazil Mfumo. The 2nd Respondent is a duly appointed arbitrator under the auspices of the 2nd Respondent, namely the Conciliation Mediation and Arbitration Commission (commonly known by the acronym "CMAC"). The 3 rd Respondent is a trade union duly registered in terms of the provisions of the Industrial Relation Act 2000 and having its principal office at Agora Shopping Complex, King Mswati III Avenue, Matsapha Industrial Sites, Matsapha, District of Manzini, Kingdom of Swaziland.

The history of the matter.

[3] The facts of the matter briefly stated are that on or about 21st March 2005, a dispute between the Applicant and the 3 rd Respondent was declared unresolved and a certificate of unresolved dispute issued. The dispute arose as a result of Legal Notice No. 129 of 2004, namely the Wages Regulations Order - Textile and Apparel Industry 2004 which set out the minimum wages for the Textile and Apparel Industry.

[4] In terms of the Legal Notice 129 of 2004, the maximum hours permitted for work for the industry is 48 hours per week. In terms of a collective agreement between the Applicant and the 3rd Respondent, it has been agreed that employees at Applicant's concern will work 45.5 hours per week.

The dispute.

[5] The crux of the dispute before the arbitrator was that the Applicant sought to use the gazetted minimum hours (48hrs) as a denominator to arrive at the employees' hourly rate to pay whereas the 3rd Respondent sought to use the agreed weekly hours of work being 45.5 hours.

[6] The arbitrator's award is that the 45.5 hours be used as a denominator to arrive at the employee's hourly rate. The Applicant now contends before this court that the arbitrator misdirected herself on a

point of law when reaching the decision that 45.5 hours be used as a denominator. The basis of Applicant's contention is two-fold as follows:

i) The 48 hours is the gazetted time for the industry and the use thereof does not result in the under payment of the 3rd Respondent's members. The 3rd Respondents' members continue to be paid in terms of the minimum wages set by Legal Notice No.
129/2004.

ii) The collective agreement spoken of provides, at paragraph 17, that all matters referring to salaries and wages being referred to 2005 negotiations.

The Applicant's arguments.

[7] In the premise, so the argument goes, the arbitrator's decision is objectionable on the grounds of unreasonableness and is liable to being reviewed, corrected and/or set aside. In support of this conclusion the Applicant relies on what is said by the writer Rose Innes - Judicial Review of Administrative Tribunals in South Africa at page 211 to the following effect:

"...the unreasonableness of the decision must be so gross that something else can be inferred from it, either that it is inexplicable except upon the assumption of malafides or ulterior motives or that it amounts to proof that the person on whom the discretion is conferred ha snot applied his mind to the matter".

The Respondent's arguments.

[8] On the other hand, the Respondents have taken the view in limine that the Applicant has failed to

demonstrate in its papers how the 1st Respondent has acted unreasonably on the basis on which the conclusion of unreasonableness of the 1st Respondent's decision was reached.

[9] On the merits the Respondent argues that the Is Respondent properly directed herself and/or correctly held that the hours as stated in the collective agreement be used as a denominator for the calculation of the 3rd Respondent's members hourly rate. Further, at paragraph 8 of their Answering affidavit, it is averred that it is not relevant whether the use of the 48 hours gazetted time for the industry will result not in under payment or whether they continue to be paid in terms of the Legal Notice No. 129/2004. The point of determination and which was before the 1st Respondent for determination was whether there was any legal basis upon which the 48 hours would have been used as a denominator for hourly rates of the 3rd Respondent's members.

The applicable law.

[10] The trite principle under this ground for review has been aptly stated by Rose Innes (supra) that the unreasonableness of the decision must be so gross that something else can be inferred from it, either that it is inexplicable except upon the assumption of mala fides or ulterior or that it amounts to prove that the person on whom the discretion is conferred has not applied his mind to the matter. It remains to be seen in casu whether the Applicant has established any of the above.

[11] Innes J, in the case of Dolyle vs Schenker Co. Ltd 1915 A.D. 223 at 266 said the following:

"Now a mistake of law in adjudicating upon a suit ... cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue and the distinction between procedure by appeal and procedure by review so carefully drawn by statute and observed in practice would largely disappear".

[12] The 3rd Respondent's Counsel further referred the court to the instructive cases of Zaayman vs Provincial Director: CCMA Gauteng and others 1998 (20) T.L.J at page 412 - 416, Country Fair Food (Pty) Ltd vs Commissioner for Conciliation, Mediation and Arbitrator and others 1999 (20) IU at page 2609 at 2615 - 2616, City Lodge Hotels Ltd vs Gilbenhuys N.O. and others 1999 (20) IU2332, Mthimkhulu vs

Commissioner for Conciliation, Mediation and Arbitration and others 1999 (20) T.L.J, page 620 and that of National Construction Building: Allied Workers Union vs SAMCA Tiled (1999) Vol. IU 221 (CCMA) at page 224C.

Applying the law to the facts.

[13] Can it be said in casu that the decision of the arbitrator was so grossly unreasonable that something else can be inferred from it, either that it is inexplicable except upon the assumption of mala fides or ulterior motives or that it amounts to proof that the arbitrator did not apply her mind to the matter? I do not think so. The arbitrator gave an impeccable and well reasoned judgment where she thoroughly weighed the arguments of both parties and stated the following:

3. Analysis of the arguments.

The question is which of the two is the most appropriate formula in calculating the employee's hourly rate.

It has been agreed as common cause that in terms of the collective agreement, the parties agreed that the working week should consist of forty-five point five hours. It is important to understand the status of a collective agreement as well as the intention of the parties to enter into one.

The Regulation of Wages (Textile and Apparel Industry) Order, Legal Notice No. 129 of 2004 regulates the basic conditions of employment. It provides for the basic minimum wage, statement of conditions of employment, hours of work etc. Employers are expected not to offer to employees less favourable terms than the statutory minima provided in this Order.

It is acceptable practice that employers and employees may agree to alter these conditions by way of collective agreements. In its nature, a collective agreement is binding to the people party to it.

It is a reasonable assumption that the agreement is negotiated and entered into in good faith and that each party is expected to adhere to its dictates. It is as though, a new law has been established to regulate the parties' conduct with each other. A party that reneges on such an agreement has in other words, broken the law.

It is the Applicant's case that the Respondent has breached this collective agreement in that the Respondent uses a dissimilar rate than the agreed in terms of the collective agreement. As a result, the Union's members are robbed and dissatisfied with the manner in which the Respondent abiding by the collective agreement? Are the Applicant's members being robbed?

The Respondent's argument is that the order provides a base on which the hourly rate ought to be calculated. I would agree with this sentiment, only in so far as there was not collective agreement improving the conditions set by the order. Surely to calculate the hourly rate based on the statutory forty-eight hours would disadvantage the employees when there is an

existing agreement, which improves their working conditions. To this end, I find that the Applicant's members are being robbed of E0.24, which would be a true reflection of the hours worked by the employees.

The fact of the matter is that the employees do not work for forty-eight hours per week, why then base their hourly rate at forty-eight? The parties have agreed that their working week shall consist of forty-five point five hours and this should be the basis of any (or all) calculations relating to the employees' hourly rates.

[14] In the present case, the Applicant has failed to plead facts and/or good reasons in law that render the award of the 1st Respondent objectionable or reviewable. In fact no basis have been advanced to support the allegations of unreasonableness on the part of the 1st Respondent. Further, it appears to me, that it was not the point before the arbitrator that the 48 hours gazetted time for the industry will result not in underpayment or whether they continue to be paid in terms of the Legal Notice No. 129/2004. The point of determination and which was before the 1st Respondent for determination was whether there was any legal basis used as a denominator for hourly rates of the 3rd Respondent's members. The learned Arbitrator found that there were no basis in light of the clear and unequivocal terms of the collective agreement regarding the members of the 3rd Respondent.

[15] In the result, for the afore-going reasons I come to the conclusion that Applicant has failed to prove the relief sought and therefore the application for review is dismissed with costs.

SB MAPHALALA

JUDGE